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86-343

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JERRY YOUNG, ET AL.

Applicants,

v.

SEABOARD SYSTEM RAILROAD COMPANY

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Was it harmless error for the trial judge to give what was, in effect, a peremptory instruction against the Applicants on a question which was, per governing statute, solely for the jury to decide?

Was it abuse of discretion and/or harmless error for the trial judge to refuse the Applicants' motion for new trial after giving the peremptory instruction aforesaid together with other errors, giving testimony (his word) during his charge to the jury and submitting a copy of the governing statute as an exhibit thereto, and declaring to the courtroom audience that Mrs. Young "wilfully and bodaciously elected to come in contact with that train," according to the newspaper account published on August 10, 1984, and thus available to the unsequestered jury four days prior to its deliberation?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Plaintiffs/Appellants, Applicants here:

JERRY YOUNG

PATTY YOUNG, wife of Jerry Young

PATRICK YOUNG, minor son of Jerry and Patty Young, and

ROBERT YOUNG, adult son of Jerry and Patty Young; and

Defendant/Appellee, Respondent here:

SEABOARD SYSTEM RAILROAD COMPANY (formerly Louisville and Nashville Railroad Company), a corporation:

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TABLE OF AUTHORITIES

Cases:

McDonough Power Equipment v. Greenwood, 464 U.S. 548 (1984)

United States v. Horton, 622 F.2d 144 (5th Cir. 1980)

Statutes:

28 U.S.C. § 1254(1)

28 U.S.C. § 2111

§ 77-9-249, Miss. Code 1972, Ann. (Supp. 1985, being [1974] Gen. Laws Miss. ch 525, § 2, eff. April 4, 1974)

Treatises:

5A C.J.S. "Appeal & Error" § 1583(b) (1958)

5A C.J.S. "Appeal & Error" § 1676 (1958)

REFERENCE TO REPORTS

The judgment sought to be reviewed is entitled Jerry Young et al. v. Seaboard System Railroad Company, No. 84-4641 in the United States Court of Appeals for the Fifth Circuit (March 28, 1986, rehearing denied April 23, 1986, petition for leave to file a suggestion for rehearing en banc out of time denied July 31, 1986).

The Fifth Circuit's opinion is unpublished. The decision and denial of the petition for rehearing was reported in table at 786 F.2d 1161 (5th Cir. 1986).

The proceedings in the trial court are entitled Jerry Young, et al. v. Seaboard Coastline Systems, A Corporation, Civil Action No. S82-0447(N) in the United States District Court for the Southern District of Mississippi, Southern Division (August 14, 1986, motions for J.N.O.V. and new trial denied September 21, 1984).

STATEMENT OF JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Fifth Circuit entitled Jerry Young et al. v. Seaboard System Railroad Company, No. 84-4641. Judgment was entered March 28, 1986; petition for rehearing was denied April 23, 1986, and petition for leave to file suggestion for rehearing en banc was denied July 31, 1986.

The time allowed by law for filing a petition for writ of certiorari without extension would have expired July 22, 1986.

Extensions of time through August 31, 1986, to file a petition for writ of certiorari were granted by orders of this court given July 11, 1986, and August 15, 1986, in Jerry Young, et al. v. Seaboard System Railroad Company, No. A-7.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The following federal statute and rule, and Mississippi statute, are involved in this diversity-jurisdiction case:-

Harmless error on appeal. On hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parites. (28 U.S.C. § 2111).

Harmless error. No error in either the admission or the exclusion of evidence and no error in any ruling or order on in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (Federal Rules of Civil Procedure, Rule 61).

Section 77-9-249, Mississippi Code of 1972, Annotated (Supp. 1985, being [1974] Gen. Laws Miss. ch. 525, § 2, eff. April 4, 1974), in the Appendix at page 50.

STATEMENT OF THE CASE

This diversity-based action arose out of an automobile/train collision.

On December 12, 1981, Patty Young and her child, Patrick, were driving south on Cowan Road in Gulfport, Mississippi. They had just bought a Christmas tree and were on their way to take it home. The weather that afternoon was dark and overcast, misty, and the streets were slick. As Patty Young approached the railroad crossing she began to slow down from the 30 miles per hour she was driving. The signal lights and bells at the railroad crossing were not flashing or ringing. She looked right and left anyway, but could not see to the right because of a silver box on the railroad right of way and, as her vehicle passed the line of sight obstructed by the silver box, she was hit by a train which only then began to blow its whistle.

The car in which Patty Young and the child, Patrick, and their Christmas tree were riding was pushed some 900 feet down the railroad track by the train. Patty Young suffered extensive injuries and Patrick Young had a fractured skull and broken ankle.

This case was tried before the Honorable William Harold Cox and jury on August 6 - 14, 1984, during which Judge Cox did a number of things objected to and appealed as error, as set out in the Fifth Circuit's decision sought to be reviewed.

The most serious of those errors, as identified by the Fifth Circuit, was Judge Cox's statement to the jury during instruction that:

> The Court charges you as a matter of law that the Plaintiff, Patty Young, was guilty of contributory negligence in failing to bring her vehicle to a halt not less than fifteen feet nor more than fifty feet from the nearest rail.

And, prior to making that statement, Judge Cox had said at the beginning of the jury instruction that:

> Now I have referred one thing to the jury for you to decide under Section 3 of Sections 77-9-249 of the Code. I know very well that you don't understand what in the world I'm talking about, so I will make this copy of this statute an exhibit to this testimony. And I now hand the reporter this copy and ask him to mark it as Exhibit 1 to the testimony for the Jury's convenience.

The Fifth Circuit held that this, as well as the other errors assigned, were harmless. The Youngs disagree. This was not harmless error; this was a peremptory instruction in direct violation of the governing statute.

The doctrine of harmless error is one of judicial economy. Errors are harmless only when (a) they do not affect the substantial rights of the complaining party (Fed.R.Civ.P. 61), and (b) when the error did not and could not have affected the final result (5A C.J.S. "Appeal & Error"

§ 1676 (1958)).

Determining that to have been harmless error was a mathematical impossibility in this case. Under Section 3 of the governing statute (Section 77-9-279, Miss. Code 1972, Ann.), reprinted in the Appendix at page 50:

> The violation of this section shall not of itself defeat recovery, and the question of negligence or the violation aforesaid shall be left to the jury; and the comparative negligence statutes and prima facie statute of this state shall apply in these cases as in other cases of negligence.

In other words, the trial judge told the jury that, as a matter of law, Patty Young was negligent. But, that was not necessarily so. Patty had an obligation to stop only if one of the statutorily-defined mandatory stopping situations applied in this case. And, both that and the matter of negligence, both actual and comparative, were solely for the jury to determine.

The jury's verdict was: "We, the Jury, find for the defendant, Seaboard Systems Railroad Company." Even a properly instructed jury could not have made that finding unless it determined that Patty Young's negligence was the sole proximate cause of the accident.

The governing statute, however, a copy of which the court improperly gave to the jury, reads "sole or approximate cause of the accident."

There is no telling what confusion as to the applicable law the combination of the court's improper purported testimony and peremptory instruction, together with the copy of the Legislature's poorly worded statute the court introduced as an exhibit, must have caused the jury in this instance -- and that is the point -- if one cannot tell, then one cannot say that the error was harmless.

Ordinarily, one would expect the trial judge to grant a motion for a new trial in a case like this. This trial judge did not, and the Fifth Circuit said the judge's denial of that motion is only reviewable for abuse of discretion, citing United States v. Horton, 622 F.2d 144 (5th Cir. 1980). The Fifth Circuit went further in that case to say that:

> We consider three factors in determining whether there has been an abuse of discretion:
>
> Deference to the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record, deference to the jury's determination of weight of evidence and quantum of damages, and the constitutional allocation to juries of questions of fact. [brackets and citations omitted]. (United States v. Horton, 622 F.2d 144, 147 (5th Cir. 1980))

This is perhaps the crux of the matter because the trial court's discretion had already been abused. The trial judge purported to testify in the case and

introduced an exhibit to that testimony (a copy of the statute) which would, in any event, have been improper; he gave a peremptory instruction in violation of the statute which he had introduced; and he announced to the courtroom audience his opinion that Patty Young had, in effect, attempted to commit suicide ("willfully and bodaciously elected to come into contact with that train") -- which stretches credibility somewhat when one considers that she had her child and a Christmas tree with her in the car at that time.

This Court has made plain that the key consideration is whether or not the error complained of was harmful, in the sense used in Rule 61 of the Federal Rules of Civil Procedure (McDonough Power Equipment v. Greenwood, 464 U.S. 548, at 554 (1984)). The Youngs contend that the trial judge did abuse his discretion in this

cause, and that abuse was harmful error, virtually by definition (5A C.J.S. "Appeal & Error" § 1583(b) (1958)), which now requires a new trial be granted to them.

ARGUMENT FOR ALLOWANCE OF WRIT

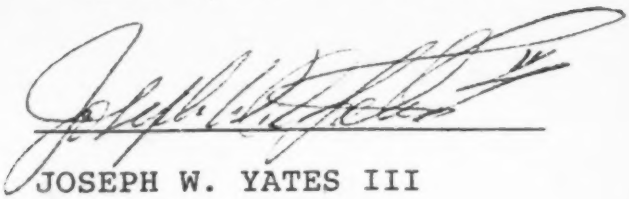
The Youngs believe that the Fifth Circuit sanctioned actions of the trial court which were so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A federal trial judge is vested with great discretion. Nobody doubts that. And, perhaps it is not possible to say with precision just where the line is beyond which a trial judge may not go in a given instance without abusing that discretion.

But, wherever that line is, this trial judge was already across it when he publicly declared himself adverse to the Youngs and instructed the jury against them. That was very harmful error, and that is

sufficient to justify the writ, the reversal, and the new trial.

Respectfully submitted,



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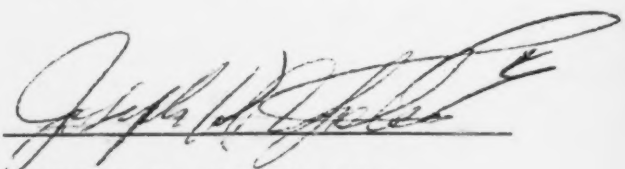
CERTIFICATE OF SERVICE

I CERTIFY that I am counsel of record for the Applicants in the above styled and numbered cause and that I have, this day, sent a true copy of the above and foregoing Petition by United States Mail, first class postage prepaid, addressed to GEORGE E. MORSE, ESQ., ~~and~~ JOHN M. HARRAL, ESQ., White and Morse, Attorneys, Post Office Drawer 100, Gulfport, Mississippi 39502, Counsel for the Respondent.

WITNESS my signature this 27th day of August, A.D. 1986.



JOSEPH W. YATES III

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-4641

JERRY YOUNG, ET AL.,
Plaintiffs-Appellants,

versus

SEABOARD SYSTEM RAILROAD COMPANY,
A CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

(March 28, 1986)

Before CLARK, Chief Judge, DAVIS, and WILLIAMS, Circuit Judges.

CLARK, CHIEF JUDGE:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and [cont'd to next page]

Jerry Young appeals a jury verdict in favor of Seaboard System Railroad Company (Seaboard). He contends that the trial court erred in (1) giving some and declining to give other jury instructions, (2) taking judicial notice of a statute and allowing the jury to take a copy of the statute to the jury room, (3) precluding his counsel from continuing voir dire, (4) admitting a traffic accident report, (5) permitting testimony by a witness not listed in the pretrial order, (6) allowing a lay witness to express an opinion, (7) failing to take judicial notice of a traffic engineering handbook, (8) admitting certain exhibits into evidence and permitting testimony

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[cont'd from preceeding page] merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

regarding such exhibits, (9) admitting staged photographs, and (10) denying plaintiff's motion for judgment notwithstanding the verdict. We affirm.

I

Mrs. Young was driving a car in which her son was a passenger across the Cowan Road railroad crossing maintained by Seaboard in Gulfport, Mississippi. A Seaboard train hit her car and caused serious, permanent injuries. Her son suffered a fractured skull and broken leg.

Mrs. Young's husband and sons sued the railroad for loss of assistance, love, affection, society, companionship and economic support of their wife and mother. The sons' suit was dismissed by the court during trial. The jury found for Seaboard in the husband's action for loss of consortium. The trial court denied Young's motion for judgment notwithstanding the

verdict, or, in the alternative, for a new trial. Young appeals claiming that the trial court's errors, individually and cumulatively, denied him a fair trial.

II

The most serious of the errors assigned occurred in the course of the court's effort to comment on its view of the proof offered yet convey the understanding that Mississippi's statutory rule governing railroad crossing accidents left all questions of negligence to the jury.

In one portion of its charge to the jury, the court stated:

> . . . as a matter of law, the plaintiff, Patty Young, was guilty of contributory negligence in failing to bring her vehicle to a halt not less than fifteen feet, nor more than fifty feet to the nearest rail. If you believe from a preponderance of the evidence, if any, that the sole proximate cause of any or all of the plaintiff's injuries was the failure of the plaintiff, Patty Young, to bring her vehicle to a halt at a point not more than fifty feet and not less than fifteen feet from the nearest rail, you shall return a verdict for the

defendant. And that is the very reason why I wanted you to have in your juryroom a copy of that act of the Legislature which makes it the function of the jury, not the court as it used to be, but it's not that way any more. [It is] left up to the jury to decide the answer to those questions. And I have a right to comment on those questions but do not have the right to make the decision as to those questions.

In reviewing allegations of error in jury instructions, an appellate court must determine whether the charge, considered as a whole, properly enabled jurors to understand the issues to be tried. "There is no error if the instructions, when taken together, properly express the law applicable to the case even though an isolated clause is inaccurate, ambiguous, incomplete or otherwise subject to criticism." Vicksburg Furniture Mfg., Ltd v. Aetna Cas. and Sur. Co., 625 F.2d 1167, 1169 (5th Cir. 1980).

In this diversity-based case, the court was bound to follow Mississippi law.

The trial judge, a long-time Mississippi practicioner and jurist, was obviously concerned that the State's last amendment to its statute governing railroad crossings be correctly applied.[1] The subject of the

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[1] § 77-9-249 provides:

(1) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:

(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;

(b) A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;

(c) A railroad train approaching within approximately nine hundred feet of the highway crossing emits a signal in accordance with section 77-9-225, and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;

(d) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

. . .

[Cont'd to next page]

effect of the amended statute on this proceeding came up frequently in the course of discussions with counsel and its substance appeared no less than four times in the instructions to the jury. Indeed, at the conclusion of the proof the court even improperly introduced a copy of the statute as a court exhibit. It was literally hammered into this jury that regardless of the court's view of whose neglect caused or contributed to the accident, the jury alone

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[Cont'd from preceeding page]

(3) In the trial of all actions to recover personal injury or property damages, sustained by any driver of such vehicles for collision of said vehicle and train in which action it may appear that the said driver may have violated any of the provisions hereof, the question of whether or not the said violation was the sole or approximate cause of the accident and injury shall be for the jury to determine. The recovery, and the question of negligence or the violation aforesaid shall be left to the jury; and the comparative negligence statutes and prima facie statute of this state shall apply in these cases as in other cases of negligence.

was to decide all issues of fault.

Viewed in isolation the court's "as a matter of law" words are an improper directed verdict on the issue of contributory negligence. However, taken in context and considered as they must have been perceived by a reasonable jury they were no more than a judicial comment on the evidence which the members of the jury were free to accept or reject. Time and again in the course of the charge the jury was told that under Mississippi law the ultimate decision on all issues of negligence was theirs. These admonitions included a supplemental instruction, given in response to plaintiff counsel's objection, which stated:

"[T]his question is presented to the jury on the basis of your honor and your integrity to decide the question fairly and impartially to both sides in this case . . . [The statute] just simply requires the Court, instead of deciding the case myself, to turn the question over to the jury, and

I've done exactly that."

Considering the charge as a whole and the particular language in its context, it is apparent that this judicial comment on the proof, though erroneously stated, did not affect any of Young's substantial rights. It was thus harmless. Fed.R.Civ. P. 61.

III

Young asserts that other erroneous instructions were given and some correct instructions were improperly denied. He contends one charge that Mrs. Young was under a duty to stop her vehicle was cumulative, repetitious and gave undue prominence to the statute. He characterizes an instruction that railroad personnel had a right to presume that Young would stop if the train complied with the law in giving proper signals as peremptory, abstract, ambiguous and conducive to a jury verdict for the railroad. Another assignment claims

the jury was improperly told that if the statutory signals were gven, no verdict could be returned for the Youngs based on the failure of the engineer to reduce train speed. Young contends that this instruction totally removed the issue of improper speed from the jury in a situation where the railroad crossing was shown to lack sufficient warning devices and to be unusually dangerous in nature.

Young claims the trial court committed reversible error in instructing the jury that it could not return a verdict based upon any finding that the train was moving at an excessive rate of speed. He insists that where one party alleges that the train was speeding under the existing circumstances, an instruction removing the issue of speed from the jury is erroneous even where there is no fact issue as to the train's actual speed. Young's final

instruction contention is that the jury should have been charged that a railroad is to utilize such care as is commensurate with the hazards associated with a given railroad crossing. If a crossing is unusually dangerous, the railroad has an increased duty to give reasonable and adequate warning signals to motorists.

We have examined each contested instruction and refusal to instruct by considering the instructions as a whole and the proof adduced. In this light, the charge to the jury represented a fair and adequate portrayal of the applicable law and correctly defined the function of the jury.

IV

In a related argument, Young contends that not only did the judge err in charging the jury that Patty Young was guilty of contributory negligence as a matter of law, but also compounded that

error by giving the jury a photocopy of the applicable statute as the court's exhibit C-1 to take to the jury room. Young insists that this action singled out the particular statute and gave it undue prominence. We agree that the court's action was improper. However, it was harmless error under the circumstances of this case. The statute is the embodiment of controlling law and was central to the jury's task in evaluating the evidence. More importantly, it is entirely neutral as between the parties and the operative content of the statute was iterated in the instructions numerous times. The introduction of the statute was cumulative. The error affected no substantial rights of the parties.

V

Young claims that the court did not allow his counsel to conduct the full voir dire examination he was entitled to. This

claim is specious. Young's counsel simply wanted to argue their case to the jury in the context of voir dire. The record indicates that counsel were afforded sufficient opportunity to question the prospective jurors and no proper part of the purpose of voir dire was denied.

VI

Young contends that the Gulfport Police Department's report of the accident at issue should not have been admitted because the accident report contained hearsay statements which could not be cross-examined at trial and did not qualify under the business record exception to the hearsay rule. Young also objects to its admission on the ground that conclusions as to fault made by the officer who prepared the report constituted opinion evidence on the ultimate issue--whether Young should have stopped her car before crossing the tracks. We note,

however, that while the report contained a check mark indicating that the driver "disregarded warning sign," it did not contain any conclusion that Mrs. Young was negligent or that she failed to yield the right of way.

This circuit has allowed police reports to be admitted into evidence as business records exceptions to the hearsay rule. United States v. Barrentine, 591 F.2d 1069 (5th Cir. 1979). Fed R. Evid. 803(6) expressly includes opinions as proper subjects of admissible entries. Therefore, the officer's opinion as to the fact that the car "slid onto the railroad tracks" and Mrs. Young "disregarded warning sign or signal" does not in and of itself render the report inadmissible.

The problem in this area arises where the maker of a report kept in the course of a regularly conducted business

activity does not have personal knowledge of the occurrence on which a conclusion is based. For example, where a police report incorporates statements of other witnesses, the report may be inadmissible because although the officer qualifies as acting in the regular course of business, the witness may not. Gencarella v. Fyfe, 171 F.2d 412 (1st Cir. 1948). If the witness' statement qualifies under another exception to the hearsay rule, such as an admission or an excited utterance, the double hearsay problem is ameliorated. United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975).

In the case at bar, the police report did not purport to describe a statement by any witness to the accident. There is thus no "hearsay within hearsay" problem in the technical sense. It does, however, contain conclusory statements regarding events leading up to the accident.

The officer was not present when the accident occurred and he testified that he based his conclusion on a conversation he had with an eye-witness and on the evidence that he found at the scene.

The record does not show what predicate facts for this conclusion came from observations of the officer and what basis it had from the recall of others. The admission of the accident report may well have been error. The police officer testified, and the jury knew, that he was not present at the time the accident occurred. He was cross-examined extensively as to that fact. Its bases were explored before the jury as fully as plaintiff wished. Even more importantly, four eye-witnesses testified as to what did occur at the accident scene. This report was not the only evidence or even crucial evidence as to what took place at the railroad crossing.

The admission of the report was cumulative. It did not substantially affect the rights of the Plaintiff.

VII

Young also argues that the trial court erred in permittting a witness to testify on behalf of the railroad company who was not listed as a prospective witness in the pretrial order. Young's counsel contend they were unable to adequately and fully cross-examine this witness as to potential biases that she may have held. The railroad responded that the witness was unknown to them at the time of the pretrial order and had only volunteered to testify after the trial was underway.

The trial judge is granted broad discretion to modify pretrial orders to admit witnesses not listed in the order. Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980). His decision is reviewable only

for abuse of discretion. Newman v. A.E. Staley Manufacturing Co., 648 F.2d 330, 333 (5th Cir. 1981). Despite the trial judge's immoderate statement that he believed in trial "by ambush," we cannot find that he abused his discretion in allowing Greene to testify when her knowledge of pertinent facts remained unknown to counsel for all parties until the trial began. Moreover, Young's concern regarding his counsel's inability to discern witness bias is not supported by the record. His counsel fully explored that avenue of impeachment in the presence of the jury when the witness was recalled for further testimony.

VIII

Young claims that a signal maintainer for Seabord and a lay witness for the defense, should not have been allowed to express an opinion. The witness testified that, based upon his inspection of the

signals immediately after the accident during which he found no mechanical or technical deficiencies, the signals were working properly prior to the accident. This contention is negated by Fed. R. Evid. 701 which allows opinion testimony by a law witness if such testimony is rationally based on the perception of the witness and helpful to a determination of a fact in issue. Since the testimony was based on an inspection on the day of the accident, the admission of this testimony was within the trial court's discretion.

IX

Young contends that the district court erred in failing to take judicial notice of Table 19-5, Minimum Stopping Sight Distance on Wet Pavements, Transportation and Traffic Engineering Handbook, Second Edition, Institute of Transportation Engineers (1982), which he sought to

introduce as rebuttal evidence. He also protests the admission of a chart evidencing sight lines and viewing distances from the railroad crossing and the railroad's expert testimony regarding the charts claiming it invaded the province of the jury. Another similar contention concerned the admission of photographs depicting a train approaching the accident scene which was alleged to create a distorted impression of the view from the accident scene.

The district court's refusal to take judicial notice of the table of minimum stopping distances was clearly within its discretion under Fed. R. Evid. 201. Young sought to have the table judicially noticed as a learned treatise exception to the hearsay rule, Fed. R. Evid. 803(18), but the table was not authenticated by the railroad's or Young's expert. Admissibility under Fed. R. Evid. 201 was not raised in

the trial court. The charts, expert testimony and photographs did not invade the province of the jury nor were they deceptive. All questions of admissibility regarding these exhibits and testimony were within the trial court's discretion under Fed. R. Evid. 403 and that discretion was not abused.

X

Young argues that the trial court erred in denying his motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial, because the verdict was against the overwhelming weight of evidence and because prejudicial remarks of the trial judge were published in newspapers accessible to the jury. Young may not claim prejudicial error based on publication of the court's comments. His counsel did not object to such publication at any time before the verdict, although the

remarks were published during the trial. Assuming that Young could have established that some juror read the published remarks and was influenced by them, he cannot adopt a wait-and-see attitude with regard to the allegedly prejudicial publication in hopes of a favorable jury verdict. Prompt objection could have detected whether taint existed and whether it was correctable. Any possible error was waived.

The grant or denial of a new trial rests within the discretion of the trial court and is only reviewable for an abuse of discretion. United States v. Horton, 622 F.2d 144 (5th Cir. 1980). In this case there was substantial evidence to support the jury verdict and the trial court did not abuse its discretion in denying Young's motion.

XI

In conclusion, we have not only

examined each error assigned on its own merit, but also reviewed all assignments cumulatively. The result of this review is the firm conviction that plaintiff was accorded a fair opportunity to convince a reasonable jury by a preponderance of the evidence that he should be awarded damages from the defendant. He did not. The trial was not a perfect one. Few, if any, are. However, it was fair. The mistakes made had no significant impact on justice. The judgment appealed from is

AFFIRMED.

JERRE S. WILLIAMS, Circuit Judge, dissenting:

The trial court committed two serious and related errors in this case. I cannot escape the conclusion that these errors so tainted the jury verdict that this case should be reversed for a new trial.

I concede, of course, that the majority opinion correctly read the record when it concluded that a number of times in the course of the charge the jury was told that under Mississippi Law the ultimate decision on "questions" was theirs. But when the trial judge also told the jury specifically that "as a matter of law" Mrs. Young had an obligation to stop before reaching the railroad crossing, all of the admonitions that the issue of negligence was for the jury were put to naught.

This serious prejudicial error was then compounded by the judge introducing as a court exhibit the critical statutory provision, § 77-9-249, and sending it into the jury room with the jury. This was the second prejudicial error.

After being so instructed the jury in effect was told to look at the statute carefully and read it carefully. A

reasonable reading of the statute shows that what the judge had done by his instructions was to compel a finding of plaintiff's negligence as a matter of law. This left for the jury only the "questions" of possible negligence by the railroad and proximate cause. Those are the "questions" which jurors after this instruction could properly believe were left to them. By declaring the obligation "as a matter of law" the judge even barred the jury from considering the factual issue of whether one of the four statutory requirements (a, b, c, or d), any one of which establishes the obligation to stop, had been met.

Thus, the judge's instruction had the effect of removing from the jury one of the issues posed by the statute -- the obligation to stop. That is not what the statute provides but that is what the judge made it provide. The judge's general

instructions about the role of the jury fell far short of correcting this analytical amendment to the statute which he brought about by his erroneous instruction.

I cannot find such an improper instruction to be harmless because it changed the entire basic theory of the statutory provision. The direction to the jury that plaintiff was negligent, in turn, made it far easier for the jury to find that defendant was not. Under an "accidents do not happen, they are caused" philosophy which the jury might well have applied, the jury could then believe that the court had told them the cause of the accident and they had little obligation to consider defendant's role. I can only conclude that appellants are entitled to a new trial.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-4641

JERRY YOUNG ET AL.,

Plaintiffs-Appellants,

versus

SEABOARD SYSTEM RAILROAD COMPANY,
A Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING
(April 23, 1986)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-4641

JERRY YOUNG, ET AL.,
Plaintiffs-Appellants,

versus

SEABOARD SYSTEM RAILROAD COMPANY,
A Corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

(July 31, 1986)

O R D E R:

IT IS ORDERED that appellant's petition for leave to file a suggestion for rehearing en banc out of time is DENIED.

COX RULES OUT PUNITIVE DAMAGES IN RAIL TRIAL

By Margaret Henry

Staff Writer

U.S. District Judge Harold Cox on Thursday ruled out punitive damages against the Seaboard System Railroads.

. . . .

Cox made the rulings after the plaintiffs' lawyers rested their case -- and after sending the jury out of the courtroom.

While the jury was out of earshot, Cox commented on the case. He said Mrs. Young "willfully and bodaciously elected to come in contact with that train. . . ." The judge added that "a railroad track" is "a very dangerous place to be. She knew that when she drove a car upon this track."

. . . .

The trial . . . is expected to continue into next week. (The Sun (Gulfport, Mississippi), August 10, 1984, at A8)

BY THE COURT:

Members of the Jury, this is the case of Jerry Young, Patty Young and Patrick Young, a minor by and through his father and next friend, Jerry Young, and Robert Young as plaintiffs, versus the Seaboard Coastline Systems, a corporation, defendant. That's the style of this amended complaint that you have befcre you that you've been hearing testimony on for several days.

Now I have referred one thing to the jury for you to decide under Section 3 of Sections 77-9-249 of the Code. I know very well that you don't understand what in the world I'm talking about, so I will make this copy of this statute an exhibit to this testimony. And I now hand the reporter this copy and ask him to mark it as Exhibit 1 to the testimony for the Jury's convenience.

[SAME RECEIVED AND MARKED EXHIBIT C-1]

EXHIBIT NO. C-1
CAUSE NO. 582-0447(N)
WITNESS
PAGES 1

AUG 14 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
Dave Scott REPORTER

§ 77-9-249. Obedience to signal indicating approach of train; penalties.

(1) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:

(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;

(b) A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;

(c) A railroad train approaching within approximately nine hundred feet of the highway crossing emits a signal in accordance with section 77-9-225, and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;

(d) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

(2) No person shall drive any vehicle through, around or under any crossing gate or barrier at a railroad crossing while such gate or barrier is closed or is being opened or closed.

(3) In the trial of all actions to recover personal injury or property damages, sustained by any driver of such vehicles for collision of said vehicle and train in which action it may appear that the said driver may have violated any of the provisions hereof, the question of whether or not the said violation was the sole or approximate cause of the accident and injury shall be for the jury to determine. The violation of this section shall not of itself defeat recovery, and the question of negligence or the violation aforesaid shall be left to the jury; and the comparative negligence statutes and prima facie statute of this state shall apply in these cases as in other cases of negligence.

(4) Every person, company or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both, in the discretion of the court.

SOURCES: Laws, 1974, ch. 525, § 2, eff from and after passage (approved April 4, 1974).

Research and Practice References—

65 Am Jur 2d, Railroads §§ 545 et seq.

Accidents at crossings, 21 Am Jur Pl & Pr Forms (Rev ed), Railroads, Forms 261 et seq.

23 Am Jur Trials, Railroad Crossing Accident Litigation §§ 1 et seq.

You know, this Court takes judicial notice of all the statutes of the State of Mississippi relating to any kind of case. But anybody knows that a judge of this court can't possible know all the law and can't possibly be personally familiiar with every statute. So not that I can't take judicial notice of the statute, but I merely offer the copy of this section of the code which you will be using in answering some of the complaints before you. [Emphasis added]. (R. 1006-07).

. . . . . .

You are further instructed for the defendant that under the law of the State of Mississippi, the plaintiff, Patty Young, was obliged to bring her vehicle to a halt at a distance of not less than fifteen feet from the nearest rail, nor more than fifty feet from the nearest rail if the approaching

train is clearly visible and was in hazardous proximity to such crossing. The Court charges you as a matter of law that the plaintiff, Patty Young, was guilty of contributory negligence in failing to bring her vehicle to a halt not less than fifteen feet nor more than fifty feet to the nearest rail. If you believe from a preponderance of the evidence, if any, that the sole proximate cause of any or all of the plaintiff's injuries was the failure of the plaintiff, Patty Young, to bring her vehicle to a halt at a point not more than fifty feet and not less than fifteen feet from the nearest rail, you shall return a verdict for the defendant. And that is the very reason why I wanted you to have in your juryroom a copy of the act of the Legislature which makes it the function of the jury, not the court as it used to be, but it's not that way any more, left up to the jury to decide

the answer to those questions. And I have the right to comment on those questions but do not have the right to make the decision as to those questions. [Emphasis added] (R. 1027-28).

(Court Reporter's Transcript, Young v. Seaboard Coastline Systems R.R., No. S82-0447(N) in the U.S. District Court (S.D. Miss.), Aug. 6 - 13, 1984).